CALIFORNIA

Atty Generals Office

California School Land Grant

1913

IN THE MATTER OF THE ADJUSTMENT

OF THE

California School Land Grant

Communication to the

Honorable, the Secretary of the Interior

FROM

U. S. Webb

Attorney General of the State of California

FRIEND WM. RICHARDSON, SUPERINTENDENT OF STATE PRINTING
SACRAMENTO, CALIFORNIA
1913

SAN FRANCISCO, November 11, 1913.

IN THE MATTER OF THE ADJUSTMENT OF THE CALIFORNIA SCHOOL LAND GRANT.

To the Honorable, the Secretary of the Interior,

SIR:

The matter of the adjustment of the California School Land Grant has been pending for several years, and it was believed that final agreement respecting the same had been reached, and that the Department would proceed as expeditiously as possible to the listing of the, approximately, 400,000 acres awaiting departmental action.

This belief was induced through repeated assurances from the Department that listing would proceed when the State had performed the acts on its part to be performed, pursuant to such agreement, and the full performance by the State, as will hereafter appear, of all things required of it.

By night letter received October 10, 1913, the Surveyor General of the State was advised that a new question had arisen in the Department, and that no action upon withheld selections would be taken by the Department until that question had been determined. The night letter referred to is as follows:

"October 9, 1913.

"No indemnity school land selections have been approved since July first. Question as to authority generally to make

such selections as under act of 1891 is before Department. Letter follows.

BRUCE, Assistant Commissioner."

From this and the letter referred to it appears that the Department is now questioning the authority of the Government to accept as bases surveyed school selections lying within the exterior limits of Government reserves.

The importance of this question and the tremendous evil and loss to the State of California which would result from an adverse decision is my excuse for this letter, and justifies, I believe, the extended review of the negotiations heretofore had between the State and your Department which is hereinafter made. These negotiations cover a period of years, and at no time during their continuance has it been suggested by the Department, directly or indirectly, that there existed in the mind of any departmental official a doubt as to the power or duty of the Department to accept such bases, nor has it been suggested that there be, or could be, the slightest disposition to disregard the several decisions of the Department made many years ago, holding such selections to be valid, but, on the contrary, all parties have dealt with this question in the light of such decisions and with full faith in their finality.

The negotiations respecting this matter have been carried forward through several different administrations of the Interior Department, and this fact seems to suggest at this time a somewhat general review of the various steps taken during such period.

Briefs fully discussing the legal problems having heretofore been presented to the Department by the State, and by others, it seems unnecessary in this letter to rediscuss the law, and therefore the law will be referred to or discussed only in so far as it seems advisable so to do to illustrate or explain a fact or facts set forth.

By section 6 of an act of Congress approved March 3, 1853, sections sixteen and thirty-six in each township were granted to the State of California for the purposes of public schools.

Section 7 of said act provides that where any settlement is made upon the sixteenth or thirty-sixth sections before survey, or where such sections may be reserved for public uses, or taken by private claims, other land shall be selected by the proper authorities of the State in lieu thereof.

Section 6 of an act of Congress entitled "An act to quiet land titles in California," approved July 23, 1866, provides that an act entitled "An act to provide for the survey of the public lands in California," * * * approved March 3, 1853, shall be construed as giving the State of California the right to select for school purposes other lands in lieu of such sixteenth and thirty-sixth sections as were settled upon prior to survey, reserved for public uses, covered by *grants made under Spanish or Mexican authority*, or by other private claims, etc.

Section 2275 (26 Stat. L., 796, February 28, 1891) provides:

> "And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said state or territory where sections sixteen and thirty-six are *mineral land,* or are included within any *Indian, military or other* reservation, or are otherwise disposed of by the United States."

Section 2276 provides for selections to compensate for deficiencies of school lands in fractional townships.

Under date of November 2, 1903, the Commissioner of the General Land Office, by letter "G" addressed to the State Surveyor General required the State to adjust the school grant so that each township in which the State has lost lands in place may be charged with the number of acres actually taken as indemnity therefor.

On February 14, 1905, the Commissioner addressed another communication to the State Surveyor General concerning the adjustment in which he states that unless some action is taken within a reasonable time in response to letters previously written, his office would feel justified in applying towards the adjustment of the grant any actual losses that shall be found to have occurred.

Said communication was answered by the State Surveyor General on April 6, 1905, which closes with the statement:

> "This communication is but preliminary to a fuller discussion of the matter in the brief which I shall hope to be able to transmit to you very shortly."

The Department on November 17, 1905, held in 34 L. D. 270:

> "It is not only within the power of this Department, but becomes its necessary duty, to see that sufficient losses or quantities to which the grant might have been entitled, had they been in place and not otherwise disposed of, equal in amount to previous certifications on account of this grant, approximately, are furnished as a base for such previous approvals or certifications, before other approvals and certifications are made on account of the grant."

And instructed the Commissioner to advise the State of California of the conclusions reached.

The departmental decision was promulgated by Commissioner's letter "G" of December 15, 1905, which reads:

> "I enclose herewith a copy of departmental decision of November 17, 1905, relative to the excess in approvals or certifications heretofore made to the State of California on account of her grant in aid of common schools.
>
> The matter of the further adjustment of this grant, and other school grants to the several states, is remanded to the primary consideration of this office, with direction that the State of California be advised of the conclusions reached, viz: That where, through mistake, school land indemnity selections were permitted to exceed the losses, the approved selections are not affected, but that the only reasonable course open to the Department in protecting the interests of the United States in the matter, is to exact that losses be supplied to meet the excess in approvals, before further approvals or certifications are made on account of the grant.
>
> The attention of the State has been called, in a number of office letters to cases wherein approvals were made in excess of the losses of school land, with request in each case for the designation of sufficient new and valid base to satisfy the excess in approval. It is hoped and expected that these requests, as well as similar requests that may be made in

future will be considered separately by the State with a view to supplying valid base in satisfaction of all excesses of approvals. In case of difference of opinion as to excess of approval, in any such case, the State may, if she desires, present her views to this office for further consideration.

The matter of these excesses in approvals must be finally determined and adjusted before action may be taken looking to the submission of pending school land indemnity selections of the State of California to the Secretary of the Interior for approval, with a view to the certification of the selected land to the State."

On January 17, 1906, the Commissioner by letter "G," advised the State Surveyor General, in part, as follows:

"Permit me to state further that unless response to some of said letters is received prior to March 31, 1906, this office will feel justified in applying towards the adjustment of this matter any actual losses that shall be found to have occurred, as suggested in office letter 'G' of February 14, 1905."

On March 26, 1906, the State Surveyor General answered said letter, and, in reply, the Commissioner, by letter "G" of April 23, 1906, stated in part:

"Unless further action in this matter is taken by you at an early date, this office will proceed as suggested in the last paragraph of office letter 'G' of January 17, 1906."

When the present State Surveyor General, W. S. Kingsbury, assumed office in January, 1907, he conferred with me concerning the subject of the adjustment, and the withholding from listing for a number of years, the lands selected by the State. The result of the conference was the preparation and introduction on February 15, 1907, of Assembly Bill 889, providing for an amicable adjustment of the controversy.

A copy of the bill was transmitted to Senator Flint with the request that he ascertain whether its provisions were satisfactory to the Department of the Interior. He replied by telegram that the Secretary stated that the only legislation necessary was the vesting in some state officer the right to assign lands equal in quantity to that previously approved to the State. To meet these suggestions, changes were made in the bill, and on March 21, 1907, Senate companion Bill 793 became a law (Stats. 1907, 840). This bill read as follows:

"An act to authorize the settlement of an existing controversy between the United States of America and State of California, and making an appropriation to carry out the provisions of said act.

WHEREAS, The federal government claims that certain mistakes have been made in the past wherein and whereby the State of California has received and there has been listed to the State, 40,000 acres or thereabouts of the public domain in excess of the just amount of lands that the State of California was entitled to under the grant in lieu of sixteenth and thirty-sixth sections and that the State of California should restore to the United States an area equal to such excess listings to be taken from the sixteenth and thirty-sixth sections within forest reservations; and

WHEREAS, The state maintains that such claim is barred by the provisions of the act of congress of March 1, 1877, found in volume 19, of the United States Statutes, page 267, confirming the title of the state to selections listed prior thereto, and also by the act of congress of March 3, 1891, found in volume 26 of the United States Statutes, page 1095, limiting the time within which the United States can begin suits to vacate and annul patents; now, therefore,

The people of the State of California, represented in Senate and Assembly, do enact as follows:

SECTION 1. The surveyor general of the State of Cali-

fornia is hereby authorized, on or before July 1, 1907, to enter into a stipulation with the secretary of the interior of the United States of America which shall provide that the question as to whether or not the United States is now entitled under the laws of the United States to claim anything of the State of California by virtue of such previous listings, shall be submitted to the attorney general of the United States for his opinion, and if the opinion of that official is rendered in favor of the contention of the State of California, that then and in that event such opinion shall be final, and shall be binding upon the United States of America.

SEC. 2. If, on the other hand, the opinion of the attorney general of the United States shall be adverse to the contention of the State of California, either in whole or in part, then and in that event the surveyor general of the State of California is hereby empowered to make a report of the facts concerning said controversy to the governor of the State of California and to the attorney general of the State of California, and present with such report a copy of the opinion of the attorney general of the United States; thereafter the surveyor general of the State of California and the governor of the State of California and the attorney general of the State of California are authorized and directed to make such examination of the law and the facts as will enable them to determine whether the opinion of the attorney general of the United States is well founded in whole or in part; if they find that the opinion of the attorney general of the United States is well founded in whole or in part, then the surveyor general, as register of the state land office, shall prepare a patent in the name of the State of California in favor of the United States of America to such portion of the sixteenth and thirty-sixth sections contained in the San Jacinto Forest Reserve as will equal in area the number of acres so ascertained and determined to have been unlawfully listed, and said patent shall be executed by the same officers and in the same manner as other patents are executed, and the register of the state land office shall record said patent in his office, and thereafter shall cause the same to be delivered to the secretary of the interior at Washington, in the District of Columbia.

SEC. 3. Until such controversy is determined in whole or in part, all of the provisions of Chapter 1, Title 8, Part 3 of the Political Code are hereby suspended as to all of the lands embraced in the San Jacinto Forest Reserve for which application to purchase has not been accepted and filed prior to February 14, 1907.

In the event that the said opinion of the attorney general of the United States is rendered in favor of the contention of the State of California, or if the secretary of the interior shall fail, on or before July 1, 1907, to enter into the stipulation mentioned in section one of this act, or if in the opinion of the governor and attorney general and surveyor general of this state the claim of the United States is not well founded, either in whole or in part, then this section shall immediately cease to be operative. In the event that the opinion of the attorney general of the United States is unfavorable to the contention of the State of California, either in whole or in part, and said controversy is thereafter considered by the state officials as herein set forth, and any patent is thereafter executed conveying to the United States of America certain lands, then all the provisions of this section shall cease to be operative when said patent is recorded in the office of the register of the state land office.

SEC. 4. Before the surveyor general as register of the state land office, delivers to the United States of America any patent as herein provided, he shall enter into such stipulations with the secretary of the interior as may be necessary and proper to obtain a ruling from that officer upon all state selections, heretofore made and now pending in the office of the commissioner of the general land office, for lands in lieu of the sixteenth and thirty-sixth sections.

SEC. 5. For the purpose of carrying out the provisions of this statute the sum of $5,000.00 is hereby appropriated out of any money in the state treasury not otherwise appropriated, and the state controller is hereby authorized to draw his warrant therefor, and the state treasurer is hereby authorized and directed to pay said warrant.

SEC. 6. This act shall take effect immediately."

On March 30, 1907, the Commissioner of the General Land Office, in letter "G," advised the State Surveyor General as follows:

"By letter 'G' of November 2, 1903, your attention was called to the fact that, in a preliminary examination made with a view to the adjustment of the school land grant of the State of California, it was found that selections of indemnity lands had been approved in excess of the loss sustained to the extent of more than six thousand acres, and request was made of the State to supply proper bases for the selection, all of which was set forth in detail. Replying to said letter, the State Surveyor General in his letter of December 28, 1903, admitted the justice of the request and signified his willingness to comply therewith 'as soon as some of the pending forest reservations are made final.'

By forty different letters 'G' bearing dates from April 6 to June 15, 1904, the State of California, through its Surveyor General, was called upon to supply new and proper bases for indemnity school land selections aggregating 5262.67 acres additional to those previously reported.

April 6, 1905, the State Surveyor General, in view of the fact that the preliminary examination of this office disclosed that there was a deficiency of over 40,000 acres in the entire grant that the State would be called upon to make good, took the position that certain fundamental questions should be determined before the State could accede to the demands of this office for additional base lands, and with his letter of August 8, 1905, he filed a brief in the premises, defining the State's position. This brief was submitted to the Department with a report, October 31, 1905, and November 17, 1905 (34 L. D. 270), the Department remanded the case to this office with instructions that it was its necessary duty,

'to see that sufficient losses or quantities to which the grant might have been entitled had they been in place and not otherwise disposed of, equal in amount to previous certifications on account of this grant, approximately, are furnished as a base for such previous approvals or certifications, before other approvals and certifications are made on account of the grant.'

A copy of said decision was furnished your office December 15, 1905, and a copy of letter 'G' of October 31, 1905, to the Department was sent you January 17, 1906.

March 29, 1906, seven lists, in the form of applications for indemnity school lands, were transmitted to this office as a compliance with office letter 'G' of November 2, 1903, but by letter 'G' of April 23, 1906, the assignments of base lands therein made were rejected. As far as this office is advised there has been no serious endeavor on the part of the State to comply with the requirements of this office in the matter of the adjustment of its school grant, but the State has continued to make new selections upon whatever base lands it can find available, which selections, if approved and the practice continued, would effectually prevent any adjustment.

The fact is patent that in all cases where the State has had erroneously approved to it selections without having sustained a corresponding loss, or without surrendering an equivalent, and such approved excess selections have not been confirmed by any act of Congress, the State is in duty bound to indemnify the United States, either by surrendering other lands which are the property of the State, and which under authority of act of February 28, 1891 Secs. 2275 and 2276, Rev. Stats.), may be exchanged for public lands of the United States, or by accepting the approval of such excess of selections in satisfaction of a corresponding loss, for which no indemnity has heretofore been received.

It has been intimated in the correspondence from your office that the State Surveyor General has no legal authority to surrender the lands of the State in exchange for lands which have been erroneously certified to the State. However that may be, this office of course could not without the consent of the State, acting through its proper officer, assign in satisfaction of the excess selections, any lands the title to which is vested in the State. It has authority, however, to adjust the indemnity grant of the State, and where it finds that selections have been approved upon a defective or improper base, and that there remain unsatisfied losses, it can refuse to allow any further indemnity therefor until

the defective or improper bases have been made good by the State; or it may itself make such assignment of base from unsatisfied losses, and this is what must of necessity be done, unless immediate steps are taken by the State as will insure a satisfactory adjustment.

This may be accomplished if the State will set aside fifty thousand acres of unappropriated lands in sections 16 and 36, within forest or other reserves for which the State has received no indemnity, and which are available as bases for selection of indemnity, or fifty thousand acres of unsatisfied losses to the school grant, or any base lands that are available for indemnity, with the understanding that this office may after notice to the State, subject to the right of appeal to the Department in each case, make assignments of bases therefrom for selections heretofore improperly approved upon insufficient bases.

If this is not done, then it is proposed to take all pending unapproved indemnity selection lists, embracing selections upon assigned losses in mineral and fractional townships, for sections 16 and 36 alleged to be swamp and overflowed lands, and for school lands claimed under settlement or other laws, and reject the pending selections, and at the same time apply the base to some specific approved selection deficient in base, and in that event, to prevent further unauthorized segregations in excess of the indemnity grant to the State, the several land offices in the State will be instructed to reject, until further notice, all school land indemnity applications unless the same are in lieu of surveyed school lands embraced in forest reserves after survey.

If the State is not willing to accede to the plan of adjustment by setting aside sufficient lands to meet the demand for deficient bases, it is allowed thirty days within which to show cause why the alternative action proposed should not be taken."

On April 20, 1907, my assistant, Mr. Sturtevant, and the Surveyor General had a hearing before Secretary of the Interior Garfield. In the discussion, Mr. Sturtevant contended that where the excess list-

ing occurred prior to the act of March 1, 1877 (19 Stats. U. S. 267), the Federal Government had no claim against the State of California, but that its remedy was against the persons who purchased from the State. The Secretary being assured by them that the Surveyor General would assist the United States in obtaining from his office the necessary data to proceed against the purchasers from the State, and that the State would refund to said purchasers the amount of money which they would pay to the Federal Government, suggested that it seemed to him that such a course should be pursued as to excess listing prior to March 1, 1877.

Mr. Secretary then withdrew, and the question of overlisting subsequent to March 1, 1877, was presented to Mr. Commissioner Ballinger, Mr. Sturtevant contending that the Federal Government could not question overlistings occurring prior to 1896, calling attention to the act of 1891 (26 United States Statutes at Large, 1093), which provides that the Federal Government will not assume to cancel a patent which has been outstanding five years. Attention was called and authorities cited to the fact that this statute had been applied to lands passing by certification as well as by patent.

The Federal officials present at the hearing apparently acquiesced in the correctness of the legal contentions made in behalf of the State, as a tentative agreement was drawn by Assistant Attorney General

Woodruff, who was present during the hearing; the following being a copy thereof:

"Memorandum concerning the understanding of the action to be taken in regard to the excess in approvals heretofore given on account of school grant to the State of California.

It is understood that Assistant Attorney General Sturtevant and Surveyor General Kingsbury will submit to the Governor for his consideration, the following tentative proposition in settlement of this excess:

1. Where the excess occurred prior to the act of March 1, 1877, the simplest arrangement will be made between the Surveyor General's office of the State and the General Land Office of the United States, whereby $1.25 per acre will be paid to the United States for each acre of such excess in completion of the title of the purchasers through the State under the provisions of the act of March 1, 1877.

2. That for the excess since March 1, 1877, the Surveyor General shall offer as substitute base such an amount of land as will equal said excess since March 1, 1877."

Upon the return of Mr. Sturtevant and the Surveyor General to California, the agreement was submitted to the Governor and myself, and we were, on the whole, satisfied therewith.

Thereafter, a formal agreement, drawn on the lines of said tentative agreement was signed by the Surveyor General and transmitted to the Department of the Interior on June 25, 1907, by me. The following is a copy of the formal agreement:

"*In the matter of the controversy between the United States of America and the State of California, as to the liability of the State of California for excess listings of lands in lieu of school lands.*

WHEREAS, The Legislature of the State of California, on March 21, 1907, did enact a certain statute entitled 'An act

to authorize the settlement of an existing controversy between the United States of America and the State of California, and making an appropriation to carry out the provisions of said act;'

AND WHEREAS, The Secretary of the Interior and the Surveyor General of the State of California thereafter did stipulate to submit to the Attorney General of the United States for his opinion, the question as to whether or not the United States is now entitled under the laws of the United States to claim anything of the State of California by virtue of any previous listing of lands in lieu of state school lands;

AND WHEREAS, Said matter was fully argued and discussed by both parties to the controversy before him, the said Attorney General of the United States, and said Attorney General did orally render an opinion on said question;

AND WHEREAS, The said Surveyor General did thereafter communicate said opinion to the Governor of the State of California and to the Attorney General of the State of California;

AND WHEREAS, The Governor, the Attorney General and the Surveyor General of the State of California, have agreed to the terms of said opinion;

Now, Therefore, *It is hereby mutually stipulated, covenanted and agreed,* as follows, to wit:

1. Where the excess occurred prior to the act of March 1, 1877, the simplest arrangement will be made between the Surveyor General's Office of the State and the General Land Office of the United States whereby $1.25 per acre will be paid to the United States for each acre of such excess in completion of the title of the purchasers through the State under the provisions of the act of March 1, 1877.

2. That for the excess since March 1, 1877, the Surveyor General shall offer as substitute base such an amount of land as will equal said excess since March 1, 1877, not to exceed six thousand (6,000) acres.

3. Regarding any selections which have heretofore been made and which, on the 21st day of March, 1907, were pending in the Department of the Interior, or any office thereof, and where substantial rights had been predicated upon the state selection, faulty in some particulars, and the circum-

stances tended to show an honest mistake, in the absence of an intervening adverse claim the Land Department will, in every possible way, aid an honest endeavor on the part of the state's officers to protect the interests of the state's transferee, either by way of amendment of an existing selection, or through reselection of the lands.

IN WITNESS WHEREOF, The parties, by their officials thereunto duly authorized, hereunto set their hands this 1st day of July, 1907.

Secretary of the Interior.

Surveyor General of the State of California and ex officio Register of the State Land Office."

In reply, Acting Secretary of the Interior, George W. Woodruff, on September 20, 1907, answered, in part, as follows:

"The matters considered, it is believed unnecessary to enter into any formal agreement, but the Commissioner of the General Land Office has been this day directed to enter actively upon the completion of the adjustment, proceeding in harmony with the propositions tentatively agreed upon, and it is expected that the State will lend its hearty co-operation to facilitating an early and complete adjustment."

The first communication from the Commissioner of the General Land Office concerning specific instances of excess approvals, dated December 10, 1907, is as follows:

"As the result of a conference held last spring between representatives of this Department and of the State of California, in the matter of the adjustment of the grant of lands made to said State in aid of common schools and as a preliminary adjustment made along lines then tentatively agreed upon, I have to call your attention to the following instances of excess approvals given under said grant prior

to March 1, 1877, in which, in the opinion of this Department, purchase should be made of such excess lands as contemplated by the act of March 1, 1877 (19 Stats. 267), the selections having failed because the bases assigned therefor had been theretofore fully satisfied or were not capable of identification and thus, in effect, were wanting, to the end that the purchasers of such excess lands from the State may be protected and the United States reimbursed for the title erroneously given.

In the matter of items 1 to 14, inclusive, herein, the State assigned as base for the selections so called deficiencies of base in earlier approved lists, and not specific losses, or alleged losses, to its school grant. The other items are self-explanatory. * * *

The aggregate quantity of land certified to the State in excess of her losses of school land, in the items considered herein, amounts to 13,568.13 acres ($16,960.16), and while an attempt has been made to make this statement as comprehensive as possible, nothing herein must be construed as indicating that further calls may not, and will not, be made upon the State for payments for similar excesses in certifications over losses of school lands, should such excesses be found in the further adjustment of the school grant.

The act of March 1, 1877, confirms indemnity school land selections made in lieu of sections 16 and 36, within, or supposed at date of selection to be within, the boundaries of Mexican grants, and certified prior to its passage, and provides, in case the sections 16 and 36 for which indemnity has been so taken, are on final survey, excluded from such grants, that the sections 16 and 36, so excluded, shall be disposed of as other public lands of the United States. The act does not, in express terms, provide for the disposal by the United States, in cases of excess certifications, of lands in sections 16 and 36, apparently remaining to the State in place, where losses of school lands were due to the fractional condition of townships or to disposals by the United States based on settlement claims. I have, therefore, suggested payment herein, in a number of cases of overcertification, where the losses were due to such fractional condition and disposals, notwithstanding the fact that there are lands, in

place, in the school sections, to which, it may be, the United States could assert title.

Now as to payment: Bearing in mind the fact that, except as to items 1 to 14, inclusive, the adjustment must be by townships, the simplest arrangement, it seems to me, will be for the State to make application, with tender of payment, through your office, in behalf of its purchaser for the selected tract or tracts to which the excess is charged, or for the acreage in any such selected tract or tracts corresponding to the acreage of the excess. For instance, in item 17, the excess of 8.88 acres is charged to the selection of N. ½ Sec. 2, T. 1 N., R. 1 E., 328.88 acres, and application and payment may be made for 8.88 acres of the entire tract or for 8.88 acres of any legal subdivision therein. No single application is to be made for an area greater, approximately than 320 acres, the maximum acreage prescribed in the act of 1877 to be purchased by any one person. As to items 1 to 14, inclusive, a separate application and payment should be made in case of each selection. For example, in the matter of item 1, application and payment should be made for Lots 5 and 8, Sec. 1, T. 11 N., R. 16 W., and a separate application and payment for Lot 1, Sec. 8, T. 6 N., R. 8. W.

Payment, in each case, is to be made to the receiver of the district land office in which the selected tract lies. Receivers will, in case the method for payment, suggested herein, meets your approval, be instructed, when payment, in any case, is tendered, to examine the local office records and if it be found that the tract for which payment, wholly or in part, is proposed to be made, was selected by the State as indemnity school land and the selection approved prior to March 1, 1877, to issue receipt, in duplicate, for the amount paid, one copy (accompanied by the State's application) to be forwarded to this office with the regular monthly returns, and the other copy to your office. Each such receipt will run to the State of California, by the Surveyor General thereof, and will show that the payment therein acknowledged was made in behalf of the State's grantee (named) and as under the provisions of the act of March 1, 1877.

This plan for payment is suggested for the purpose of avoiding delay and also to the end that no unnecessary alarm

may be created among the purchasers from the State which probably would result if calls were made directly upon the purchasers for payment.

Congress apparently contemplated, in the act of 1877, the issuance by this office of patents to the State's purchasers, in certain cases, for the lands theretofore erroneously certified to the State and sold to them, and thereafter to be purchased by them from the United States. Decisions of the courts, however, are numerous that certification is the equivalent of patent and operates as effectually to divest the United States of title as would a patent (see 77 Cal. 300; 115 U. S. 102; 138 N. S. 514). The title of the State's grantee, in any case considered herein, would not be strengthened by the issuance of patent as under the provisions of the act of 1877, and it is not proposed to issue such patents. The grant will be adjusted, in one class of cases, when payment shall have been made for the excess in certification—when the United States receives its equivalent in money—in a second class of cases (to be the subject of a separate letter), when new and valid base is offered by the State and duly accepted by the United States Land Department of an acreage equal to the excess in selection, and in a third class of cases, when the United States shall assert claim to certain lands in school sections.

Kindly advise me as soon as practicable whether or not you approve of the method of payment suggested herein. If so, appropriate instructions will be issued to the registers and receivers of local land offices in California, and a copy of same will be mailed to you.

You are aware, of course, that the acreage of pending unapproved indemnity school land selections of the State of California is very large; that no present action looking to the approval of such selections is being taken in this office and are advised that no such selections will be listed for approval and certification, other than in exceptional cases where the interests of the Federal Government will be advanced by such action, until the matters presented in this letter and in other letters now in course of preparation have been satisfactorily adjusted."

Please note the words of the Commissioner:

> "This plan for payment is suggested for the purpose of avoiding delay and also to the end that no unnecessary alarm may be created among the purchasers from the State which probably would result if calls were made *directly upon the purchasers for payment.*"

Said plan is not at all in accord with that part of the tentative agreement which reads:

> "$1.25 per acre will be paid to the United States for each acre of such excess in *completion of the title of the purchasers* through the State *under the provisions of the act of March 1, 1877.*"

The Commissioner's letter of December 10, 1907, was referred to me by the Surveyor General, and on March 9, 1908, I advised him that the course suggested in said letter of December 10, 1907, was absolutely impossible, and was entirely different from the method outlined in the tentative agreement and one that could not be legally supported. The Surveyor General so informed the Secretary on May 12, 1908, while he was in Washington, and the following is a copy of the Secretary's reply:

> "Referring to the repeated conferences in the matter of the further certification of lands under the grant in aid of common schools in the State of California, which has been suspended because of certain disclosures made by a preliminary adjustment of said grant evidencing an excess in certifications on account thereof, the nature of which excess has been fully explained in correspondence heretofore had between the Commissioner of the General Land Office and officers of the State, it appears that it is claimed on behalf of the State that as to all such excess certifications occurring prior to the passage of the act of March 1, 1877 (19 Stats.

267), the same have been and were confirmed by said act; that the tentative agreement heretofore reached between this Department and certain officers of the State, looking to the satisfaction of said excess, was misunderstood by the officers of the State, and whether misunderstood or not can not be carried out otherwise than after some judicial determination, and you now suggest on behalf of the State that action upon the demand heretofore made upon the State to furnish bases on account of such excess in certifications occurring, as before stated, prior to the passage of the act of March 1, 1877, be not insisted upon as a condition precedent to further adjustment of said school land grant, and that upon supplying satisfactory bases equal to the excesses in certifications which have occurred since March 1, 1877, the further adjustment of said grant be proceeded with.

The claim of the State with regard to the confirmatory effect of the act of March 1, 1877, is fully disposed of in departmental decision of November 17, 1905 (State of California, 34 L. D. 270), and the position of the Department in respect thereto is reaffirmed and adhered to. It is believed, however, that the matter of the satisfaction of excess of certifications occurring prior to the passage of the act of March 1, 1877, may safely be eliminated for the present, leaving its final adjustment to such action as the Department may find necessary upon mature consideration.

Your request is therefore granted and upon furnishing satisfactory bases in amount equal to the overcertifications which have occurred since March 1, 1877, the suspension heretofore ordered with relation to said grant will be revoked and the adjustment of all pending selections on account thereof proceeded with."

Under date of January 9, 1908, Mr. Commissioner Ballinger called the attention of the Surveyor General to the class of cases wherein the excess certifications occurred subsequent to the passage of the act of March 1, 1877, closing his letter with these words:

"As stated in my former letter, *no action* looking to the approval and certification of any school indemnity selections

of the State of California, other than in exceptional cases where the interests of the Federal Government will be advanced by such action, will be taken until the matters presented in these two letters and in other letters now in course of preparation have been satisfactorily adjusted."

Under date of February 25, 1908, Mr. Commissioner Ballinger addressed the Surveyor General, in part, as follows:

"In further adjustment of the grant of school lands to the State of California, heretofore considered at some length in my letters addressed to you under date of December 10, 1907, and January 9, of this year, the following additional cases are called to your attention, wherein the excessive approvals occurred subsequent to the passage of the act of March 1, 1877, and in which cases, in the opinion of this office, the State of California, should assign to the United States, as substitute base, such an amount of land as will equal said excesses, or overdrafts, set forth as follows, to wit: * * *

The aggregate quantity of land certified to the State in excess of her losses of school land, or upon invalid bases, in the items considered above is 1,221.52 acres, which with the amount (12,253.93 acres) brought to your attention in my letter of January 9, makes a total of 13,475.45 acres for which new and valid bases should be assigned. As other excessive approvals, or overdrafts, of this nature are found, if any there be, in the continued adjustment of this grant, they will be brought to your attention.

In the following cases the excessive approvals occurred prior to the passage of the act of March 1, 1877, and payment should be made for such excesses at the rate of $1.25 per acre as suggested in my letter of December 10, 1907, to wit: * * *

The aggregate quantity of land certified to the State in excess of her losses of school lands, considered in items 13 to 40, inclusive, herein, that is, in cases wherein the excess certifications occurred prior to the passage of the act of March 1, 1877, and for which excesses, payments should be

made, amounts to 2,363.41 acres ($2,954.26), which, with the amount brought to your attention by my letter of December 10, 1907, makes a total excess, so far tabulated, in this class of cases of 15,931.54 acres ($19,914.42). Wherever similar excesses are found, if any there be, in the further adjustment of the grant, the matter will be brought to your attention.

In another communication now in course of preparation, adjustment will be sought in that class of cases wherein, under the act of March 1, 1877, certain sections 16 and 36, assumed to be within Mexican grants, and for which the State has taken indemnity, were subsequently, upon survey, excluded either partially or entirely from said grants, and thereupon became public lands of the United States."

On March 9, 1908, another communication was addressed to the Surveyor General by the Commissioner of the General Land Office which reads, in part, as follows:

"In furtherance of the adjustment of the school land grant to the State of California, heretofore considered as to certain classes of cases in my letters addressed to you under date of December 10, 1907, and January 9 and February 25, of this year, the following cases are called to your attention where the State, prior to the passage of the act of March 1, 1877 (19 Stats. 267), has taken indemnity for certain sections 16 and 36, or portions thereof assumed to be lost in Mexican grants, which sections were, upon final survey of said grants, either partially or entirely excluded therefrom, and therefore under said act of March 1, 1877, either in their entirety, or to the extent in each case hereinafter indicated became public lands of the United States. In these cases, therefore, where the State has not assumed to dispose of said lands, adjustment will be completed when the State advises this office of the nonsale and nonencumbrance thereof and admits the title of the United States. In cases where the State has assumed to dispose of said lands, since title had already vested in the United States and the State could convey no right or interest therein, to protect transferees,

holding through mesne conveyances from the State, it is suggested that the method of adjustment outlined in the decision of the Department, July 22, 1907 (36 L. D. 23), in the case of *White* vs. *Swisher,* be adopted, viz: that the State select as school indemnity the lands disposed of, offering valid bases therefor, and thus make good the title purported to be conveyed by it.

In each of the cases hereinafter set forth, in the opinion of this office, title to sections 16 and 36, or both, or portions of them, under said act of March 1, 1877, vested in the United States, to wit: * * *

The aggregate quantity of land claimed by the United States in sections 16 and 36, in the items considered herein is 10,151.70 acres, and though it is quite probable, and undoubtedly is true in some instances, that the State has sold or encumbered or attempted to sell or encumber certain of these lands, in other instances, possibly the majority, no such sale or encumbrance has been attempted and the title of the United States has been, and is now admitted. In either case, and in all cases, however, to complete the adjustment, action as promised herein should be taken by the State.

In the endeavor to reach an amicable and equitable adjustment of this grant, I have now brought to your attention three classes of cases.

(1) Where the excess occurred prior to the passage of the act of March 1, 1877 (19 Stats. 267), the selections having failed because the bases assigned therefor had been theretofore fully satisfied, or were not capable of identification and thus in effect were wanting. In this class, payment at the rate of $1.25 per acre is to be made, and the amount so far tabulated being 15,931.54 acres ($19,914.42).

(2) Where the excess occurred subsequent to the passage of said act of March 1, 1877, the bases having failed as above. In this class, new and valid bases, equal in area to the excess is to be assigned; the amount so far tabulated being 13,475.45 acres.

(3) The class considered herein where title to lands in sections 16 and 36, vested in the United States.

Though it is thought the statements now submitted to you

comprehend practically all of the cases to be found in the three classes enumerated, in the further adjustment of the grant, other cases may be found, and if so, they will be brought to your attention.

I trust that this office will have your active co-operation in this matter, with the view to its early adjustment.''

Upon the return of the Surveyor General from Washington, the letter of the Secretary dated May 12, 1908, was submitted to the Governor and myself, and we were satisfied therewith.

On July 20, 1908, the Surveyor General addressed the following letter to Mr. Commissioner:

''Since my return from Washington I have had conferences with the Governor and the Attorney General concerning the adjustment of the school land grant, and they acquiesce in the terms of the proposed settlement as set forth in the communication from the First Assistant Secretary of the Interior to me under date of May 12, 1908.

I will at once compare statements furnished by your office showing the excess certifications subsequent to March 1, 1877, with the records of this office, and when the comparison is completed I will issue a patent to the United States as provided in chapter 452, approved March 21, 1907. Enclosed find copy of said chapter.

The patent will embrace lands equaling in area the excess certifications subsequent to March 1, 1877, and lying within sections 16 and 36 included within the San Jacinto Forest Reserve which have been certified clear to the State by the United States Land Office, the title to which having in no way been encumbered by the State of California.

The issuance of said patent was discussed with officers of the Interior Department, who expressed the belief that, in view of the provisions of said chapter 452, a patent would be satisfactory.

Although the communication of May 12, 1908, eliminates all matters considered in your letter of March 9, 1908, the State recognizes the justness of the claim, and I will

endeavor to furnish you with a list of sections enumerated in said letter, which, upon survey, fell outside of the Mexican grants, where the State has not assumed to dispose of said lands.

Where the State has disposed of any of those lands you wish the State to select said lands by offering valid base therefor. This method of settlement is not feasible from the standpoint of the State.

I have discussed the matter with the Governor and the Attorney General, who advised me to inform you that the Attorney General would prepare a bill to be presented to the State Legislature next January, providing for the payment to the United States of $1.25 per acre for every acre of land sold by the State for which the State had obtained indemnity before or since 1877.

If presented, the bill will pass, and I hope this method of settlement will meet with your approval."

To which the Commissioner, on August 14, 1908, replied, as follows:

"I have your letter of July 20, 1908, relative to the adjustment of the California school grant. You propose to check the statements showing excesses in certifications of indemnity school lands subsequent to the passage of the act of March 1, 1877 (19 Stats. 267), heretofore furnished you by this office, and to issue a patent to the United States conveying lands in granted school sections 16 and 36 within the boundaries of the San Jacinto (now part of the Cleveland) National Forest, equal in area to the aggregate of such excesses, as provided in the act of the California Legislature, approved by the Governor March 21, 1907.

As stated in your letter, the question of the issuance of such a patent as that now proposed has been discussed by you with officers of the Land Department, and while from the viewpoint of this office the matter should be adjusted by the assignment of new and valid base for the excess selections certified since March 1, 1877, this being the method of adjustment originally contemplated for this class of excesses, I am of the opinion that adjustment may be had,

as to the excesses since March 1, 1877, called to your attention in the statements mentioned herein, by the issuance of a patent as suggested by you.

The patent proposed to be issued must be accompanied by certificates by you and by the proper county officers showing nonsale and nonencumbrance, by the State, of the lands proposed to be conveyed. It must also be duly recorded by the State in the county or counties wherein such lands are situated. It is suggested that the patent, before being recorded in your office or on the county records, be forwarded to this office for examination as to form and substance and as to the land proposed to be conveyed. The certificates of nonsale and nonencumbrance, mentioned herein, should accompany the patent when so forwarded.

I note with satisfaction that you propose to take up for consideration the cases mentioned in letter of March 9, 1908, viz: those representing lands in sections 16 and 36, which, under the provisions of the act of March 1, 1877, *supra,* are subject to disposal as other public lands of the United States. This office is now causing an examination of county records to be made with reference to these lands, but will be glad to consider any data you may furnish relative to same. The letter of March 9, 1908, suggested, in case the State had assumed to dispose of any of these lands, that the method of adjustment outlined in departmental decision of July 22, 1907, case of *White* vs. *Swisher* (36 L. D. 23), be adopted, viz: that the State protect the interests of her grantees by selecting the land disposed of by her. This method of settlement, you say, is not feasible from the standpoint of the State, and that it is proposed to present a bill to the Legislature of the State, January next, providing for payment to the United States of $1.25 per acre, for every acre of land sold by the State for which the State had received indemnity *before or since* 1877.

The land in sections 16 and 36, which, under the provisions of the act of 1877, is to be disposed of as other public land of the United States, is the property of the United States; and as stated by the Department in the *White-Swisher* case, it can only be disposed of under the general land laws, or under some statute authorizing the disposal of

it as public land, and no recognition or consideration can be given to the patent of the State as conveying any right or title therein.

There is no federal statute authorizing the sale of such land to the State of California, and while this office will not presume to suggest what laws should be enacted by the Legislature of the State of California in furtherance of the adjustment of the State's school grant, I am very strongly of the opinion that in any case where the State has sold lands the title to which is in the United States, she should select such lands for the benefit and protection of her grantee, and further, that in all cases of excess certification subsequent to March 1, 1877, she should designate new and valid base to the extent of the excess. Whether this designation shall be by patent, or by assignment of base, is not now believed to be material. As to the excesses prior to March 1, 1877, it is hoped that a way may be found for indemnifying the United States along the lines suggested in office letter or statement of December 10, 1907, or if the method of adjustment suggested therein be found impracticable, for the designation of new and valid base to the extent of these excesses also. It is understood, of course, that the revocation of the present suspension with reference to the California school grant is not now held to be dependent upon the adjudication of the excesses prior to March 1, 1877.

Thanking you for the interest taken in this matter, I am."

Immediately thereafter the items of overlisting contained in the Commissioner's letters of January 9 and February 25, 1908, were compared with the records of the Surveyor General's office, and the total amount of overcertifications which had been brought to the attention of the State was found to be 12,000 acres.

On June 15, 1909, a patent for 12,000 acres of land located in the Cleveland National Forest (formerly the San Jacinto Forest Reserve) was forwarded to

the Commissioner. The patent was rejected on July 19, 1909, by the Commissioner, who stated:

> "I have your letter of June 15, transmitting a patent executed under the provisions of an act of the State Legislature approved March 21, 1907, conveying to the United States twelve thousand acres of land in sections sixteen and thirty-six, within the Cleveland National Forest, 'in full satisfaction of all overcertifications of indemnity school selections made to the State of California, on account of loss to its school grant, subsequent to March 1, 1877.'
>
> The deed referred to contains the recital that the same 'is made by the State of California and accepted by the United States of America in full satisfaction of all overcertifications of indemnity selections made to the State of California on account of loss to its school grant subsequent to March 1, 1877.' This stipulation does not meet with the approval of the office. The understanding is that for the excess since March 1, 1877, the State shall offer substitute base, acre for acre, and it has not been determined, or agreed, that the area offered covers all excesses of this class of cases.
>
> It is true that this amount covers the cases so far brought to your attention, and, while the lists submitted to you have been made as comprehensive as possible and have covered all known cases, it was not intended to convey the impression that this amount embraced *all possible* cases of the class under consideration. In the continued adjustment of said grant it is not improbable that other cases of overcertification may be found and, if so, it is the opinion of the office that they should be called to your attention, in order that all valid claims might be satisfied.
>
> In other particulars the deed appears satisfactory and, if it should be amended in the manner indicated, it would meet with the approval of the office. As soon thereafter as it may be recorded and returned, the matter will be taken up with the Department and a recommendation made that the suspension as to pending indemnity selections be revoked and authority given to proceed with the adjustment of the grant.
>
> I now desire to call your attention to the status of the following described sections 16 and 36, for which the State

has received indemnity in whole, or in part, because of their alleged mineral character, and which the State has sold or encumbered before, or after, receiving indemnity therefor, to wit: * * * .

The cases herein mentioned, are in addition to those cases heretofore submitted to you, and comprise a separate and distinct class from any heretofore brought to your attention. They were not considered and in fact their existence was not apparent at the time of the first examination of the grant, as the result of which the excess certifications seem to approximate some 40,000 acres. The total acreage of this class, that is, of lands alleged to be mineral in character, for which indemnity has been taken, and which have been sold by the State, or to which the title has been clouded, or incumbered, so far as reported and tabulated herein, is 8,715.30 acres, and it is the opinion of this office that, in lieu of these lands, the State of California should convey to the United States an equal acreage, as substitute base. In reporting to the Department in connection with this matter, attention will be called to this class of cases, and it would seem proper to suggest that, until a satisfactory settlement has been reached in the premises, that the suspension now in force be continued as to a certain portion of the pending selections, permitting the office to retain control of certain losses, or quantities, to which the grant might be entitled, equal in amount to the area herein set forth. So far as now known, this amount comprises all cases of this class, but if, in the further adjustment of the grant, similar cases should be found, they will be brought to your attention.

I return the patent hereinbefore referred to, that it may be changed as suggested herein. I also return quitclaim deed from the Southern California Mountain Water Company to the State of California."

On October 4, 1909, the Commissioner addressed the Surveyor General as follows:

"On June 15, last, you forwarded to this office a patent, or deed, of the State of California, conveying to the United States, 12,000 acres of land in sections 16 and 36, within the

boundaries of the Cleveland National Forest, which deed contained a stipulation to the effect that same was made and accepted in full satisfaction of all overcertifications of indemnity school land to the State of California since March 1, 1877.

Under date of July 19, 1909, this office suggested a substitute stipulation, to which, it is understood, the officers of the State object, but are willing to eliminate the original stipulation from the deed. Seeing no objection to such a proceeding, I suggested to the Secretary of the Interior, on the 25th ultimo, that the general suspension heretofore ordered by the Department with relation to the California school grant be revoked, subject to the condition that the stipulation placed by the State in said deed of conveyance be eliminated therefrom by the State (the placing of a substitute stipulation therein being waived by the Land Department) and that same be placed of record by the State in the proper county, or counties, and then be forwarded to the General Land Office for acceptance, and that upon the acceptance of the deed by the Land Department, it proceed with the adjudication of pending selections, withholding from approval, however, a sufficient quantity of selections, based on actual losses to the State's school grant, to fully protect the interests of the United States, this last with reference to items of overcertification, and erroneous and improper selection and certification, as to which no final determination has as yet been had.

My suggestion has received departmental approval, and this is written to advise you that, upon receipt and acceptance of the deed of conveyance, without the stipulation to which objection was made, and with proper evidence that same has been duly recorded, this office will proceed with the examination of by far the greater portion of pending indemnity school land selections of the State of California as speedily as the limited clerical force available therefor will permit, and as is consistent with careful administration.

May I express the hope that this matter will receive prompt and favorable consideration by you?''

This was contrary to the agreement dated May 12, 1908, wherein the Secretary said:

> "Upon furnishing satisfactory bases in amount equal to the overcertifications which have occurred since March 1, 1877, the suspension heretofore ordered with relation to said grant will be revoked and the adjustment of *all pending selections* on account thereof proceeded with."

Notwithstanding, a new patent was issued and forwarded to the Commissioner on October 23, 1909, which was rejected by him on November 20, 1909, in a letter reading in part as follows:

> "The office must therefore for the reasons stated, decline to accept the conveyance in its present form and it is herewith returned. It is the desire of the office, however, to facilitate in every reasonable manner the adjustment of this difficulty, keeping in view at all times both the interest of the General Government and the State, and upon receipt of a conveyance conforming to the previous understanding and agreement, and with the features to which exception is herein noted, eliminated, there would appear to be no reason why it should not be accepted, and the examination of the major portion of the pending indemnity selections shortly thereafter proceeded with."

On December 8, 1909, another patent was forwarded to the General Land Office, and on January 4, 1910, it was returned by the Commissioner with a letter reading:

> "I am in receipt of your letter of December 8, 1909, inclosing an amended, or new patent executed by the State of California, in lieu of the one returned as unsatisfactory with my letter of November 20, 1909.
>
> The patent, as now presented is satisfactory to the office and is herewith returned that it may be placed of record in the proper counties. When returned with evidences that the same has been properly recorded, the office will, upon

acceptance thereof proceed with the examination of the major portion of the State's pending indemnity selections, withholding from approval, however, a sufficient portion thereof, based on actual losses to the school grant to fully protect the interests of the United States."

The patent was recorded and again forwarded to the Commissioner on January 15, 1910, who accepted same on February 14, 1910, in a letter reading:

"I am in receipt of your letter of January 15, 1910, enclosing the patent which was returned with my letter of January 4, for recording. Said patent was executed under an act of the State Legislature approved March 21, 1907, entitled 'An act to authorize the settlement of an existing controversy between the United States of America and the State of California, and making an appropriation to carry out the provisions of said act,' and conveys 12,000 acres of land in sections 16 and 36 within the Cleveland National Forest, lying in Riverside and San Diego counties, to the United States, in satisfaction of 12,000 acres of overcertifications of school land indemnity selections since March 1, 1877. Said patent bears evidence of having been recorded in Book 5 of Patents at page 155 *et seq.*, Records of Riverside County, and in Book 11 of Patents, at page 327 *et seq.*, Records of San Diego County.

The conveyance is satisfactory, and is hereby accepted. The office will now, as rapidly as the limited clerical force available therefor will permit, and as is consistent with careful administration, take up and examine with a view to clear listing, the major portion of the State's pending indemnity selections. As stated, however, in former letters to you, there will be withheld from approval a sufficient portion of such selections, based upon actual losses to the school grant, to fully protect the interests of the United States."

On March 31, 1910, the Department began the listing of selections, and up to and including October 22, 1910, had listed 18,605 acres of approximately 300,000 acres which were pending.

Under date of February 6, 1911, the General Land Office notified the office of the Surveyor General that pursuant to office order of November 29, 1910, all lands covered by selections, made by the various states, must be examined in the field by an agent of that office as to their mineral character, and a favorable report received thereon prior to their clear listing for approval by the Department.

Pursuant to the agreement reached at the conference of April 20, 1907, the State proceeded in good faith to the performance of those things enjoined upon it by virtue of such agreement, but a compliance with the agreement by the Department was not obtained, although the Secretary of the Interior, in a letter to Senator Perkins, hereinafter referred to, conceded that, after the acceptance of the patent of the State for 12,000 acres of surveyed school sections situated in the Cleveland National Forest, it was the aim and expectation of the General Land Office to proceed as rapidly as possible with the examination and listing of the State's pending selections, until the greater portion thereof had been disposed of.

Action by the Department not having been obtained, a conference was arranged between the Secretary of the Interior and the State Surveyor General and Attorney General, and such conference was had in June, 1911. The matter was then taken up with Secretary Fisher, who declined to recognize the binding force of the agreement theretofore reached, or to act in accord with it, or to consider the Department bound by it. But, upon the contrary, the Honorable

Secretary imposed new conditions with which he demanded the State must comply before a promise of progress in the matter of selection would be made. The State denied the justice or equity or propriety of these new conditions, yet, as compliance therewith was by the Secretary made the price of promised progress in the matter, it was determined by the State authorities that the vast interests of the State justified the waiving of questions of injustice of the conditions, and a compliance therewith; in short, the State determined to yield to every demand made by the Department, in order that the controversy might be closed, and that the listings of State selections should go forward.

At the suggestion of Secretary Fisher, the Department drafted an agreement, hereinafter set out, with the understanding, as expressed in the agreement, that the same would be submitted to the Governor of the State of California for his approval. The agreement referred to is as follows:

"BASIS OF ADJUSTMENT.

(1) That there be paid to the United States, as under the provisions of the act of Congress approved March 1, 1877 (19 Stats. 267), one dollar and twenty-five cents ($1.25) per acre in satisfaction of all excess certifications of indemnity school lands which occurred prior to the date of approval of said act, and for which said lands no payment has, as yet, been made to the United States.

(2) That new and valid bases be designated by the State for all selections that have been or may be approved, made on basis of lands in sections 16 and 36, claimed or reported to be mineral in character, or embraced in forest or other reservations, and wherein such base tracts have been or may be, sold or encumbered by the State; provided, however, that

new base need not be designated in any case wherein the United States has disposed of, by patent, the tract in lieu of which indemnity was claimed and granted.

(3) That new and valid bases be designated by the State for approved selections in all cases wherein there have been, or may be, excesses in certifications occurring since March 1, 1877.

(4) That lands in sections 16 and 36, which, under the provisions of the act of Congress approved March 1, 1877 (19 Stats. 267), are the property of the United States, and which have been sold or encumbered by the State, are to be selected by the State, it being understood that the requirements of publication of notice and the filing of nonmineral affidavits in support of such selections be waived by the Land Department of the United States.

(5) That the State of California will enact such additional laws as may be necessary to carry into effect the plan of adjustment herein contained, and the Land Department of the Federal Government will favor and will use its good offices to have passed and approved such legislation by Congress as may be necessary to consummate such plan.

(6) That the Land Department will immediately proceed with the listing of all selections made by the State where the base is free from objection and the lands applied for are subject to selection by the State; provided, the Governor of the State of California shall first agree to specify and state in a call or proclamation for a special or extraordinary session of the State Legislature, to be made and held some time during the year 1911, as one of the purposes for which the Legislature is so convened, the subject and consideration of such legislation as may be required to consummate the within plan of settlement; and provided further, that if such necessary laws be not enacted at such special session, the plan of adjustment herein contained may be deemed without force and effect.''

Thereafter, such proposed agreement was submitted to the Governor, who objected to certain provisions inserted therein, and, on November 11, 1911,

addressed to the Honorable Secretary of the Interior the following letter, setting forth such objections:

"SIR:

The Attorney General and Surveyor General of California have submitted to me for approval the following basis or plan of settlement of the controversy existing between the United States and the State of California concerning the school land grant to California:

'BASIS OF ADJUSTMENT.

(1) That there be paid to the United States, as under the provisions of the act of Congress approved March 1, 1877 (19 Stats. 267), one dollar and twenty-five cents ($1.25) per acre in satisfaction of all excess certifications of indemnity school lands which occurred prior to the date of approval of said act, and for which said lands no payment has, as yet, been made to the United States.

(2) That new and valid bases be designated by the State for all selections that have been or may be approved, made on basis of lands in sections 16 and 36, claimed or reported to be mineral in character, or embraced in forest or other reservations, and wherein such base tracts have been, or may be, sold or encumbered by the State; provided, however, that new base need not be designated in any case wherein the United States has disposed of, by patent the tract in lieu of which indemnity was claimed and granted.

(3) That new and valid bases be designated by the State for approved selections in all cases wherein there have been, or may be, excesses in certifications occurring since March 1, 1877.

(4) That lands in sections 16 and 36, which, under the provisions of the act of Congress approved March 1, 1877 (19 Stats. 267), are the property of the United States, and which have been sold or encumbered by the State, are to be selected by the State, it being understood that the requirements of publication of notice and the filing of nonmineral affidavits in support of such selections be waived by the Land Department of the United States.

(5) That the State of California will enact such additional laws as may be necessary to carry into effect the plan of adjustment herein contained, and the Land Department of the Federal Government will favor and will use its good offices to have passed and approved such legislation by Congress as may be necessary to consummate such plan.

(6) That the Land Department will immediately proceed with the listing of all selections made by the State where the base is free from objection and the lands applied for are subject to selection by the State; provided the Governor of the State of California shall first agree to specify and state in a call or proclamation for a special or extraordinary session of the State Legislature, to be made and held some time during the year 1911, as one of the purposes for which the Legislature is so convened, the subject and consideration of such legislation as may be required to consummate the within plan of settlement; and provided, further, that if such necessary laws be not enacted at such special session, the plan of adjustment herein contained may be deemed without force and effect.'

1. Under the first paragraph I am informed that the State of California would be called upon to pay to the Federal Government the sum of $20,000.00 or thereabouts. This claim arises by reason of the fact that certain lands, approximating 16,000 acres, were listed to the State of California prior to March 1, 1877, but for which land so listed no sixteenth and thirty-sixth sections were offered by the State as bases.

The State of California was not, of course, entitled to indemnity, where it did not offer base in lieu thereof, and, hence, the officers of the land department of the United States were without power or authority to list government lands to the State in such cases. Their act in so doing was void, and ineffectual to pass title to the State.

The act of Congress approved March 1, 1877 (19 Stats. 267), after providing for confirmation of selections made in lieu of lands situated within Mexican grants, and before the final approval of the survey of such grants, and also of selec-

tion made in lieu of school sections not actually within the limits of Mexican grants, contains the following provision:

> *'Provided that if there be no such sixteenth or thirty-sixth section and if the land certified therefor shall be held by an innocent purchaser for a valuable consideration such purchaser* shall be allowed to prove such facts before the proper land office and shall be allowed to purchase the same at $1.25 per acre not to exceed 320 acres for any one person; *provided,* that if such person shall neglect or refuse after knowledge of such facts to furnish such proof and make payment for such land it shall be subject to the general land laws of the United States.'

The above language is too plain to be misunderstood. Non-confirmation of such selections, or listing of lands based thereon, was intended or provided for.

In

Durand vs. *Martin,* 120 U. S. 366,

the court, pointing out the three classes of cases affected by the act of March 1, 1877, speaking with reference to the third class—where no bases existed—says:

> 'And as to the third, *in lieu of confirmation bona fide* purchasers from the State were given the privilege of perfecting their titles by paying the United States for the lands at a specified price.'

The title to such indemnity lands, remained in the government; and the act above referred to in effect so declares. Innocent purchasers from the State, however, upon proving such fact, were given the right to purchase the same at $1.25 per acre, otherwise the lands were made subject to the general land laws of the United States. In order therefore for one to take advantage of the special price of $1.25 per acre, such person must prove these facts, and, if unable to do so, the price of the land was to be the same as other government lands. While attempts had been made, without authority by the land officers of the government, to list these lands to the State, the Government, acting through Congress, did not ratify such acts, but declared the title to be in the government.

Nothing in the act indicates that the State was to be called upon to pay to the government the amount it had received

from such purchasers, but on the other hand, by the terms of that act, *no person could purchase from the government at the special price of $1.25 per acre unless he was an innocent purchaser from the State for a valuable consideration.*

This is plainly pointed out in the concurring opinion of Judge Ross in the case of

Sullivan vs. *Shanklin,* 63 Cal. 247,

wherein it was attempted to require the State to repay to a purchaser $1.25 per acre, on the ground that the State did not have the title to such land. Therein it is stated:

> 'I agree that the petitioner in this case is not entitled to the writ sought. His purpose, as evidenced by the record, is to recover back from the State the money paid by him for certain land for which the State issued to him its patent, he claiming that the State had no title to convey. But it also appears that petitioner has availed himself of the benefits of the act of Congress of March 1, 1877, entitled "An act relating to indemnity school selections in California." By that act it is provided that when land has been selected and sold by the State, but to which the State has no title, and such land is held by an innocent purchaser for a valuable consideration such person shall be allowed to prove such facts before the proper land officer, and shall be permitted to purchase the land at one dollar and twenty-five cents per acre, not to exceed three hundred and twenty acres for any one person. Pursuant to the provisions of this act the petitioner made application to purchase the land from the United States, and according to his petition has made proof to the satisfaction of the register and receiver that he is the owner and holder of the State patent to the land, *and that he is an innocent purchaser from the State for a valuable consideration. In order, therefore, to acquire the land from the general government at a special rate, and as a preferred purchaser, he represented to that government that he had already paid the State for it.* For that purpose he relied upon the fact that the State had his money, and having thus secured the title, he now seeks by means of mandamus to recover back the very money on the faith and strength of which he secured the advantage. To my

mind this does not appear just, and mandamus ought not to be awarded to enforce an inequitable demand.'

Again, in *Durand* vs. *Martin, supra,* referring to the same class of cases, the court say:

'And if the State had claimed and sold land to which it had no right, and for which it could not give school land in return, an equitable provision was made for the protection of the purchaser by which he could keep the land, and the United States would get its value in money.'

It necessarily follows from the foregoing that not only would it be inequitable to the State to now require it to make the payment contemplated by paragraph one of the proposed basis of adjustment, but the officials of the land office would not be authorized to accept payment from any source other than from a purchaser from the State, upon proof that he was an innocent purchaser for a valuable consideration, as provided by said act. This paragraph, therefore, should in my judgment, be eliminated from the settlement.

2. By the terms of paragraph two, it is provided that the State shall designate new and valid bases for all selections made by it in lieu of lands claimed or reported to be mineral in character, but which were also sold or encumbered by the State. The provisions of the paragraph are satisfactory to the State.

3. The State has heretofore conveyed to the Federal Government 12,000 acres of land in satisfaction of excesses in certification occurring since March 1, 1877. But paragraph three, I understand, is inserted as a matter of precaution to cover any excesses not yet discovered. The same meets with my approval.

4. By paragraph four it is proposed that the State select all lands in sections sixteen and thirty-six which under the provisions of the act of Congress approved March 1, 1877, are the property of the United States and which have been sold or encumbered by the State. The State, in order to make such selections, would, of course, be required to designate new and valid bases. These sixteenth and thirty-sixth sections are sections which upon the final survey of Mexican grants fell without the boundaries thereof.

The act of March 1, 1877, contains the following provisions:

'SEC. 2. That where indemnity school selections have been made and certified to said State, and said selections shall fail by reason of the land in lieu of which they were taken not being included within such final survey of a Mexican grant, or are otherwise defective or invalid, the same are hereby confirmed, *and the sixteenth or thirty-sixth section, in lieu of which the selection was made, shall, upon being excluded from such final survey, be disposed of as other public lands of the United States.*'

In *Durand* vs. *Martin, supra,* it is held that all selections were confirmed by the act of March 1, 1877, where the school section in lieu of which indemnity was claimed fell without the limits of Mexican grants upon final survey thereof, and that the United States took such school sections upon such confirmation. Speaking with reference to this class of cases, the court say:

'As to the second, the selection was confirmed, *and the United States took in lieu of the selected lands that which the State would have been entitled to but for the indemnity it had claimed and got. In its effect this was an exchange of lands between the United States and the State.* * * * If the State was actually entitled to indemnity it got it, and the United States only gave what it had agreed to give. *If the State claimed and got indemnity when it ought to have taken the original school sections, the United States took the school sections* and relinquished their right to the lands which had been selected in lieu.'

If it be the fact, as stated in the act of 1877, and as held by the Supreme Court of the United States in the case of *Durand* vs. *Martin,* that the title to such sixteenth and thirty-sixth sections vested in the United States, then, of course, the State could not and did not convey title to these sections to its alleged grantees, nor could it encumber the title of the government in any manner whatever. Alleged purchasers, if title was not in the State, have had the right ever since 1872, by virtue of sections 3571 and 3572 of the Political Code of California, to secure repayment from the

State of the money paid by them. Hence this question is one between the State and purchasers from it.

But if it be claimed that the title to these school sections vested in the State of California immediately upon the survey thereof, by virtue of the act of Congress granting the sixteenth and thirty-sixth sections to the State (Stats. of 1853, p. 244), then it must follow that the act of 1877 did not divest the State of such title.

Although the State may have retained the title in itself to these school sections, the title to the indemnity lands selected in lieu thereof nevertheless passed to the State and was confirmed by the act of 1877. No doubt exists as to this fact.

Daniels vs. *Gualala Mill Co.*, 77 Cal. 300;

Cucamonga Fruit Land Co. vs. *Moir*, 83 Cal. 101;

Durand vs. *Martin, supra.*

Your department, of course, can justify its claim against the State only on the theory that the title to these school sections remained in the State, notwithstanding the provisions of the act of 1877, and hence, that the State's subsequent act in selling them did pass title to its grantees.

If the title to these sections did remain in the State then the provisions of paragraph four would be inoperative, for it is apparent that the State would be selecting lands which were not a part of the public domain, but the title to which was already vested in the State or its grantees.

The State authorities, in selling these sections, doubtless proceeded on the theory that the act of 1877 was an additional grant, and such has been one of the arguments of the State, I understand, in this controversy; but conceding that it was not intended as an additional grant, and conceding likewise that the title to these sections remained in the State (for if they passed to the government by the act of 1877, the State's subsequent attempted conveyance would be a mere nullity), it appears to me that the only fair and equitable settlement, and one justified by all the facts, would be the payment by the State to the Federal Government, of the amount of money it had received for these sections. Of course, I recognize that this could be accomplished only by an act of Congress; but if Congress felt justified in 1877 in

permitting purchasers of indemnity lands from the State to perfect their title by paying to it $1.25 per acre for such lands, in cases where the State had assigned no bases whatever, it certainly would be justified after the lapse of so many years in now permitting the State to settle and adjust the matter by making a like payment.

I trust that this particular phase of the matter can be settled on this basis.

The controversy between the Federal Government and the State has been pending for a great many years, and, if possible, it would seem to me, ought to be adjusted, as no benefit can be derived by either side by permitting it to remain in the present condition. The State, in past negotiations with the department looking towards an adjustment of this matter, has always maintained that the Federal Government had no claim against it for excesses occurring prior to the act of March 1, 1877, the remedy of the government being against the persons who purchased from the State. In the negotiations which finally terminated by the State issuing to the government the patent for 12,000 acres of land, it was expressly stipulated that the order of suspension of indemnity selections should be revoked, upon the State granting to the government an amount of land equaling overlistings since 1877, leaving the question of excesses prior to such date to future determination. The State proceeded in good faith and conveyed to the government the 12,000 acres of land, and in the patent conveying the same was inserted the following:

> 'It is further understood that upon the acceptance of this patent on behalf of the United States the suspension heretofore ordered by the Secretary of the Interior with relation to the school land grants will be revoked, and the adjustment of pending selections on account thereof shall be proceeded with.'

Since said patent was made by the State, however, less than 20,000 acres have been listed, although I am informed that there is pending some 450,000 acres. I call attention to this for the purpose of showing that your department has not in the past insisted upon a settlement of matters occur-

ring prior to March 1, 1877, as a condition to further listing, but did accept the patent of the State for 12,000 acres on the express stipulation that it would revoke the suspension theretofore ordered by the Secretary of the Interior.

By a settlement along the lines outlined in this communication the entire controversy would be ended, and, while the settlement suggested by me is not as advantageous to the State as I believe the facts justify, yet, in order to end the matter I am willing to concede more than the facts may warrant, the State in the end being benefited, at least, by an increased revenue derived from taxation of these lands after listing.

An early consideration of this matter will oblige."

The Secretary of the Interior thereafter advised the Governor of the State of his unwillingness to recede from the position theretofore taken, and, upon the receipt of such advice, it was concluded to comply with the demands of the Department *in toto*. With this purpose in view the subject matter was placed in the call for a special session of the Legislature which convened in December, 1911. At that session an act was passed, authorizing the State to adjust the controversy on the terms and conditions mentioned in such agreement, in compliance with the demands of the Honorable Secretary of the Interior. Such statute is as follows:

"CHAPTER 21.

An act to authorize the adjustment and settlement of a controversy existing between the United States and the State of California, in relation to the grants made by congress to the State of California for the benefit of the public schools, and internal improvements, authorizing the conveyance of land by officers of the state for the purpose of making such adjustment and settlement, and

making an appropriation to carry out the provisions hereof.

(Approved December 24, 1911.)

WHEREAS, Under the terms and provisions of certain acts of congress of the United States five hundred thousand acres of land were granted to the state for internal improvement and the sixteenth and thirty-sixth sections in each township, and lands in lieu thereof, were granted to the State of California for school purposes; and

WHEREAS, It is claimed by the United States that prior to March 1, 1877, there were listed to the State of California approximately sixteen thousand acres of land, in excess of the amount of land to which the state was justly entitled; also that the state has received indemnity for certain sixteenth and thirty-sixth sections of land assumed to be within the exterior boundaries of Mexican grants, which sixteenth and thirty-sixth sections were subsequently either wholly or partially excluded from such grants and subsequently sold by the state, the total area being approximately ten thousand one hundred and fifty-one acres; also that the state has received indemnity for certain sixteenth and thirty-sixth sections alleged to be mineral in character which said school sections the state sold in place, either before or after receiving indemnity therefor, the total area being approximately eight thousand seven hundred and fifteen acres; also that the state received approximately two thousand and twenty-eight acres in excess of the five hundred thousand acre grant; and

WHEREAS, The department of the interior has for many years withheld from certification the greater part of the lieu land selected by the state, pending a settlement of said matters, and there remains to be listed to the state upward of four hundred and fifty thousand acres, which, if listed, would be subject to taxation; now, therefore,

The people of the State of California do enact as follows:

SECTION 1. There shall be paid to the federal government by the State of California, acting through the officers hereinafter mentioned and in the manner and upon the terms and conditions hereinafter set forth, the sum of one

and twenty-five one-hundredths dollars per acre for all excess certifications of indemnity school lands, which occurred prior to March 1, 1877, and for which said lands no payment has as yet been made to the United States.

SEC. 2. The officers of the State of California mentioned in sections 3519 and 3520 of the Political Code of said state, are hereby authorized, empowered and directed, in the manner in said sections provided, to convey to the United States by patent, or otherwise, such an amount of land in sections sixteen and thirty-six, situated in national forests or other reservations, as will equal in area all selections that have been heretofore listed or certified by the government to the State of California, made in lieu of sections sixteen and thirty-six claimed or reported to be mineral in character or embraced in forest or other reservations and wherein such base tracts have been or may be sold or encumbered by the state; *provided, however,* that no lands shall be patented in any case wherein it shall be found that the United States has disposed, by patent or otherwise, of the tract in lieu of which indemnity was claimed and granted.

SEC. 3. The officers of the state referred to in section two hereof are hereby authorized and directed to convey by patent or otherwise to the United States, in addition to the twelve thousand acres heretofore granted, an amount of land equal in area to any addition excess in certifications occurring since March 1, 1877.

The surveyor general of the State of California is hereby authorized and empowered to locate and select in the United States land offices, for the benefit of persons having certificates of purchase or patents from the state, lands in sections sixteen and thirty-six, which, under the provisions of the act of congress, approved March 1, 1877, and commonly known as the 'Booth Act' are claimed to be property of the United States, but which said lands have been heretofore sold or encumbered by the state. The said lands hereby authorized to be selected are lands which have been heretofore used or designated by the State of California, as bases for indemnity selections, and for which the State of California received indemnity, but which said lands in said sections sixteen and thirty-six the said state, also sold or encumbered. For the

purpose of making the selections hereby authorized to be made the said surveyor general is hereby authorized and empowered to use and designate any bases or lands mentioned in section 3406*a* of the Political Code of the State of California, or any other bases, which may be proper or valid in making indemnity selections.

SEC. 4. For the purpose of carrying into effect the terms and provisions of this act, the surveyor general of the State of California is authorized and directed to ascertain and determine from the records of his office and the records of the department of the interior the amount of lands which should be conveyed to the United States and likewise the number of acres of land as in this act provided for which the state has by the terms of this act authorized and directed payment to be made, and after said facts have been ascertained and determined, the said officers of said state, referred to in sections two and three hereof, are hereby authorized and directed to make, execute and deliver for said state, in its name and as its act and deed, any and all written agreements, deeds, patents or conveyances necessary to carry out and consummate the terms of this act.

SEC. 5. The sum of twenty-five thousand (25,000) dollars is hereby appropriated, out of any moneys in the state treasury not otherwise appropriated, for the purpose of carrying out the provisions of this act and paying all necessary expenses of the surveyor general and attorney general in connection herewith and the state controller is hereby authorized and directed to draw his warrant or warrants in favor of the United States, or the proper officers thereof, for such amount as may be payable to said United States under the terms hereof, and also to draw his warrant or warrants for the necessary expenses of the surveyor general and attorney general in carrying out the provisions of this act, and the state treasurer is hereby directed to pay the same."

(Statutes of 1911, p. 108, Special Session.)

On January 22, 1912, the Governor of the State of California forwarded to the Honorable Secretary of the Interior a certified copy of this act and in the

accompanying letter stated, in effect, that the State had acceded to all the demands of the Department and expressed a hope that by reason thereof the State would be saved further loss by prompt departmental action, and that the Department would advise the State of its intention to immediately list the withheld State selections. Such letter was as follows:

"SIR:

The recent legislature of the State of California passed an act authorizing the settlement of the controversy existing between the United States and the State of California concerning the school land grant to the State. The act, as passed, is in accordance with the plan of settlement agreed upon between your Department and the officers representing the State of California, when in Washington last June. I enclose you herewith a certified copy of this act.

The State of California is anxious to have the adjustment now go forward as expeditiously as possible.

When the matter was first submitted to me there appeared certain objections to the plan of settlement, but at the earnest solicitation of the Surveyor General and the Attorney General of this State, and in order to avoid further delay in the settlement, I withdrew my objections to the proposed plan of settlement, as the State was being injured greatly by the delay in listing.

In view of the fact that the State has acceded to the demands made by the Department, the State should now be saved further loss by prompt action.

Will you please advise me what steps are now being taken by the Department looking toward the immediate listing of indemnity lands to the State?"

The following reply was received by the Governor from First Assistant Secretary of the Interior Samuel Adams:

"I have received your letter of January 22, 1912, enclosing a duly certified copy of an act of the California Legis-

lature, approved by you December 23d last, providing for the adjustment of the California school grant, and note with satisfaction your expressed desire that the adjustment now go forward as expeditiously as may be.

Relative to your request for information as to what steps are being taken looking to the immediate listing of indemnity school lands to the State, you are advised that pending indemnity school land selections embracing lands of the character intended to be granted to the State, found regular, and in all respects subject to approval, will be listed, and receive departmental approval, as fast as the necessary field and office examinations can be made, and as is consistent with careful administration.

In this connection it may be of interest to you to know that working plans are being formulated under which it may not be necessary to have field examination of selected lands by agents of the General Land Office, in cases wherein such examination has been made by the Geological Survey, and the data so obtained found sufficient to justify approval of the selections.

Because of the length of time (since 1904) during which little has been done in the matter of listing lands to the State of California, the question of directing such assignments of field and office force as will expedite such listing in every way possible, will be given careful consideration, in case it can be satisfactorily shown that the State has such an amount of present available base land as will enable the officers thereof to carry out the provisions of paragraphs 2, 3, and 4, of the basis of adjustment agreed upon last June."

In answer to this quoted letter from the Honorable Assistant Secretary, the Surveyor General certified to the Department of the Interior that there were sufficient bases to carry out the terms of the agreement. In this the Surveyor General proceeded on the understanding that surveyed bases located within the exterior limits of governmental reserves would be accepted by the Government as valid bases.

In letters from the Department, it had been repeatedly stated that the delay was due to the limited clerical force in such Department, and to the necessity of making field examinations pursuant to a previous order that had been promulgated, and to the fact that money to pay the expenses of such examination was not available. When through such letters it was ascertained by the State that the delay was, or might be, due to the necessity of money to pay the expenses of this examination, the State authorities immediately presented the matter to the Representatives and Senators in Congress representing California, and, through their efforts, an item was added to the sundry civil bill of 1912, appropriating twenty-eight thousand dollars for this purpose, such being the amount that the Department had estimated necessary to cover such expenses.

Throughout these negotiations, the Federal Government on the one hand, and the State on the other, have acted with full knowledge that the lands which the State was attempting to have listed to it to the extent of, approximately, two hundred thousand acres were selected in lieu of surveyed school sections within the exterior limits of governmental reserves. It was likewise well understood by the Government, and by the State, that, if such lands were not accepted as bases, the agreement between the Department and the State could not be carried out. The Department had frequently decided such lands to be valid bases, and those decisions are referred to in briefs heretofore presented in this matter.

I may be pardoned, however, for here again suggesting that throughout these negotiations the suggestion was never made by any official of the Department that there remained any question in regard to the power of the Department, and that the entire negotiations were carried forward, both parties thereto understanding and showing by the expressions of each that they understood this question to have been definitely, conclusively, and finally disposed of by departmental decisions, and by a course of official and departmental action covering many years, in accord and harmony therewith.

The fact that no question was ever raised in regard to the power of the Department to accept surveyed school sections as valid bases, is clearly shown by the correspondence and negotiations above referred to, and particularly does such fact appear by the negotiations leading up to the making of the patent by the State of 12,000 acres of surveyed school sections situated in the Cleveland National Forest, and the acceptance thereof by the Department. At the time the patent was first prepared, the total amount of overcertifications, after comparison with the lists contained in the letters of the Commissioner theretofore sent to the Surveyor General was found to be 12,000 acres. Owing to the fact, however, that a stipulation was inserted in the patent to the effect that the same was made by the State and accepted by the United States in *full satisfaction* of all overcertifications of indemnity selections made to the State of California on account of loss to its school grant subsequent to

March 1, 1877, the Department refused to accept such patent. In the letter, however, of the Commissioner of July 19, 1909, rejecting the same it is stated that

> "In other particulars the deed appears satisfactory and, if it should be amended in the manner indicated, it would meet with the approval of the office. As soon thereafter as it may be recorded and returned, the matter will be taken up with the Department and a recommendation made that the suspension as to pending indemnity selections be revoked and authority given to proceed with the adjustment of the grant."

In the letter of the Commissioner of October 4, 1909, the State Surveyor General was advised that if the patent or deed conveying the said 12,000 acres of land hereinbefore referred to was corrected as indicated in said letter and placed of record by the State in the proper county and then forwarded to the General Land Office for acceptance he had suggested to the Secretary of the Interior

> "that upon the acceptance of a deed by the land department it proceed with the adjudication of pending selections, withholding from approval, however, a sufficient quantity of selections, based on actual losses to the State's school grant, to fully protect the interests of the United States."

The Commissioner in said letter further states that

> "My suggestion has received departmental approval, and this is written to advise you that, upon receipt and acceptance of the deed of conveyance, without the stipulation to which objection was made, and with proper evidence that same has been duly recorded, this office will proceed with the examination of by far the greater portion of pending indemnity school land selections of the State of California as speedily as the limited clerical force available therefor will permit, and as is consistent with careful administration.

> May I express the hope that this matter will receive prompt and favorable consideration by you?''

Although the letter was not in accordance with the previous order of the Secretary in that it provided that

> ''this office will proceed with the examination of by far the greater portion of pending indemnity school land selections,''

whereas, under date of May 12, 1908, the Secretary had ordered that,

> ''Upon furnishing satisfactory bases * * * the suspension heretofore ordered with relation to said grant will be revoked and the adjustment of *all* pending selections on account thereof proceeded with'';

yet the State deemed it advisable in the interests of prompt action to prepare a new patent, which was done, and forwarded to the Commissioner on October 23, 1909. This patent was still objectionable to the Department in certain particulars which are not necessary here to be enumerated, but in the letter of the Commissioner of November 20, 1909, rejecting this patent it is stated that

> ''Upon receipt of a conveyance conforming to the previous understanding and agreement, and with the features to which exception is herein noted, eliminated, there would appear to be no reason why it should not be accepted and the examination of the major portion of the pending indemnity selections shortly thereafter proceeded with.''

Again the State took up the matter of the preparation of a patent, eliminating the objectionable feature, and forwarded the same to the Department. This patent was accepted by the Department by the

letter of June 4, 1910, and after stating that the patent was satisfactory and was returned for the purpose of recordation it is said

> "When returned with evidences that the same has been properly recorded, the office will, upon acceptance thereof proceed with the examination of the major portion of the State's pending selections, withholding from approval, however, a sufficient portion thereof, based on actual losses to the school grant to fully protect the interests of the United States."

Following out the instructions of the Commissioner, the patent was properly recorded, again returned to the Department and accepted by it by letter dated February 14, 1910, in which letter, after stating that the patent bears evidence of having been properly recorded and that it is satisfactory, the Commissioner says

> "The conveyance is satisfactory, and is hereby accepted. The office will now, as rapidly as the limited clerical force available therefor will permit, and as is consistent with careful administration, take up and examine with a view to clear listing, the major portion of the State's pending indemnity selections. As stated, however, in former letters to you, there will be withheld from approval a sufficient portion of such selections, based upon actual losses to the school grant, to fully protect the interests of the United States."

Thus it appears that during all these negotiations from the making of the first patent until the recordation and acceptance by the Department of a patent which was satisfactory to it, the Department repeatedly advised the State of its determination as soon as the patent was properly prepared and accepted, of

proceeding with the adjustment of the grant and with the examination of the State's pending selections, never intimating in its rulings or correspondence that any doubt existed as to its power to so proceed, but on the other hand expressly stating that it would proceed with the examination of the State's pending selections and with the adjustment of the grant.

It may be noted with profit, at this point, that it had been practically agreed that the aggregate of overlistings would not exceed forty thousand acres, and that such aggregate amount had at this time been reduced by twelve thousand acres, the acreage covered by the patent, the acceptance of which by the Federal Government is evidenced by this letter. And it may be further added that this twelve thousand acres of land so conveyed to the United States, and so accepted by it, was within the exterior limits of National Forest Reserves, and no question was at this time, or theretofore, or has been since made to the Department's power to accept this grant, notwithstanding the location of such land. It may be noted, too, that at this time something more than three hundred thousand acres were withheld from approval. The matter of listing appears to have been taken up at this time, and about twenty thousand acres had been clear listed when the order of November 29, 1910, requiring an examination of the lands was promulgated, and it was to meet the expense of such examination that the appropriation of twenty-eight thousand dollars, hereinbefore referred to, was obtained.

This twenty thousand acres listed during this period was so clear listed upon bases, for the most part, situated within the exterior limits of forest reserves, and consisting of surveyed sixteenth and thirty-sixth sections. This is a most pertinent fact, and shows beyond question that the Department was at this time in no wise disturbed as to its power to accept such bases.

The listings which, after the acceptance of the patent of the twelve thousand acres, had proceeded very slowly, ceased upon the making of this order, and this provoked the inquiry from Senator Perkins, which was answered by the letter of Secretary Ballinger, hereinbefore referred to. Senator Perkins had transmitted to Secretary Ballinger a letter from the Surveyor General of the State, reviewing previous action and urging a continuance of listing. In his reply to Senator Perkins, Secretary Ballinger stated:

> "The facts in the case are correctly set forth in Mr. Kingsbury's communication. Unquestionably, after the acceptance of the State's patent in 1909, it was the aim and expectation of the General Land Office to proceed, as rapidly as possible, with the examination and listing of the State's pending selections, until the greater portion thereof had been disposed of. It is true that, so far, only a small acreage has been disposed of, not to exceed twenty thousand acres, but, as stated to you in my letter of January 28, 1911, this is due solely to the unusual press of work and the limited clerical force in the General Land Office, and that office has hitherto expressed its regret over its inability to dispose of a larger acreage."

The Secretary's letter then proceeds to point out

the order for field examinations as a reason for the non-progress in listing, and closes with this sentence:

> "The work is being carried forward as rapidly as possible, and though unquestionably it is somewhat prolonged and delayed with respect to the California selections, I sincerely trust that such progress will be made soon to permit further certifications to the State."

In addition to this, some specific instances are of value. In numerous General Land Office letters, copies of which are on file in the State Land Office, surveyed bases has uniformly been treated and held to be valid. For instance, in letter "G Los Angeles 010302," dated March 5, 1913, and signed by Assistant Commissioner Proudfit, and addressed to the Register and Receiver at Los Angeles, surveyed bases was used, and the letter states:

> "The base appears valid on the records of this office."

In letter "G San Francisco 03512," dated September 5, 1913, addressed to the Register and Receiver at San Francisco, and signed by the Assistant Commissioner, surveyed bases was involved, and it was said:

> "And as the new base offered appears valid on the records of this office, and no other objection appears, the application to amend will be allowed."

In letter "G Susanville 01606," addressed to the Register and Receiver at Susanville, and signed by the Assistant Commissioner, surveyed school sections within Forest Reserves was used as base, and the letter states:

> "The base offered in the amendatory application appears valid on the records of this office."

Like action will be found in many cases where such base was offered.

In reliance upon such rulings, the Surveyor General of this State, in many instances, has been required to secure certificates of non-incumbrance of the base offered, and such certificates have been furnished and accepted by the Department, without question.

These recent steps taken by the Department are in full harmony with the practice of years. Thousands of acres have heretofore been listed to the State of California on selections wherein surveyed school sections situated in forest reserves were used as base.

No question was raised by the Department when the State's patent for twelve thousand acres of surveyed school lands situated in forest reservations were offered to and accepted by the Department, as heretofore recited.

By paragraph one of the agreement of 1911, this State obligated itself to pay to the United States $1.25 per acre for all excess certification of indemnity school land prior to March 1, 1877, and this, though the State then believed, and still believes, such action was unjust, but, for the purpose of carrying out this provision, the Legislature of 1911 appropriated twenty-five thousand dollars. After an examination by the Department and by the State, the amount was ascertained to be twenty-three thousand dollars, and, in accordance with the agreement, a warrant was drawn in favor of the Commissioner of the General

Land Office for twenty-three thousand dollars, forwarded to the Commissioner, and by him accepted.

Thus, in accordance with this agreement, has the Federal Government received by patent twelve thousand acres of land and twenty-three thousand dollars in money, all under the promise to proceed with the listing of State selections, and this when it was well known and understood that it was intended to include, in the future as it had in the past, surveyed sixteenth and thirty-sixth sections, and all accepted without the suggestion of the existence of a question as to the right of the Federal Government to accept as base surveyed school lands within forest reserves.

By section two of the agreement, the State obligated itself to supply new base to cover excess where land had been sold by the State prior to the designation of the same to the Department. A compliance with this stipulation by the State would require the use of surveyed school sections. At the time the agreement was entered into, the State and the Department well knew that such use of surveyed school sections would be required, and all parties dealt with the question, knowing that this deficiency would be made by supplying surveyed school sections, situated within the limit of national forest reservations.

By section three of the agreement, the State obligated itself to designate new and valid base in all cases where there had been excess in certification since March, 1877. Such stipulation could not have been entered into, unless the State were at liberty to

designate surveyed school sections within national forest reservations, and this condition the State and the Federal Government well knew.

The ascertainment of the deficiency to be made good under this last stipulation involved the examination of records covering more than thirty years. Great labor has been required, but this work has gone on actively by the Surveyor General, in conjunction with the Department, and is now practically completed. While the State, in this particular matter, has worked in conjunction with the Department, at no time has the Department suggested that surveyed school sections could not be used to supply this deficiency. When this particular work has been completed, and the deficiency supplied, the State will have satisfied every condition resting upon it by the agreement. The Government will have received all the Department has claimed for it, either in land or in money, and the State now asks that the Department now observe the agreement and comply with its terms and perform its obligation by a clear listing of the lands withheld, in fulfillment of its repeated promises. The State has satisfied the Government's demands, has parted with its lands, has paid its money, and can it be wondered that the State views with alarm and chagrin the suggestion by the Department of the existence of a question as to its power to proceed under the agreement?

I am advised that something over four hundred thousand acres of land are now withheld from

approval. This land is not subject to taxation, to occupancy, or to improvement. The loss to the various counties of this State, by reason of the non-assessable character of the land, runs into the thousands. The loss to the State, by reason of the continued withholding of this four hundred thousand acres from utilization, improvement, and occupancy, can not be estimated. All departments of the State Government, including the Governor and the Legislature, have been active in efforts to satisfy in full the Federal Government's demands, to the end that this vast domain may be freed, thereby permitting it to be placed upon the tax rolls of the various counties wherein situated, that it may be occupied, improved, and utilized by claimants.

The briefs on file in the Department show that there is nothing in law to prevent immediate favorable action by the Government. The facts show that every requirement of equity and good faith unite in urging such favorable action. Other western states have had many thousands of acres of land listed to them, where like conditions prevailed.

California has enacted legislation warranting the approval of these selections, and has, indeed, gone to great length to meet every suggestion made by the Department, with a view of accomplishing this result.

The importance of this subject, I urge as my excuse in addressing to you a communication of this length, and I address this communication the more freely, because I know your familiarity with the

grave problems of the Pacific coast, and the existence of your steady purpose that justice shall be by your Department done to all, and injustice to none. I present this matter to you, with fullest confidence, earnestly urging favorable action, for I know that all principles of justice and equity unite in its support.

Very respectfully,

U. S. WEBB,
Attorney General.